Supreme Court, U.S.
FILED

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No. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

WESLEY A. SMITH,
Petitioner,
-v-
RICK J. LANG,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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In Forma Persona

3188

QUESTIONS PRESENTED

I). Whether Petitioner loses his Fourteenth Amendment right, not to be deprived of liberty, without Due Process of Law, if Petitioner used Entrapment as a defense?

II). Whether Petitioner's Fourteenth Amendment right to Due Process were violated by: 1). The manufacture and creating of new crime that was not existing, nor anticipated? 2). Concealing exculpatory evidence, concealing predisposition? 3). Intentionally misleading or withholding facts which negate probable cause to whom that have the ultimate authority to authorize arrest?

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PRAYER

Petitioner Wesley A. Smith, pro se, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Order of the Seventh Circuit Court of Appeals is attached, (Appendix 1pa). The Opinion of the Seventh Circuit Court affirming the United District Court for the Southern District of Indiana was unpublished Order attached, (Appendix 2pa). The Opinion of the United States District Court for the Southern District was unpublished Order attached, (Appendix 13pa).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh District denied Rehearing, entered on June 16, 1997. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth and Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> ... nor shall any State deprive any person of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

In February of 1987, a jury acquitted Petitioner, Wesley A. Smith, of possession and drug dealing charges in Hendrick's County. Petitioner used Entrapment as his sole defense. Government conduct violated Fundamental Fairness and Petitioner's right to due process, as outlined herein:

1). Petitioner was not engaged in any drug dealing activities, prior to, or during a three (3) month period from June to August of 1986, when Informant Stroud unsuccessfully tried to purchase cocaine from Petitioner, approximately five (5) times.

2). Stroud had been Petitioner's drug supplier. He first attempted to purchase some cocaine back, which he had just sold to Petitioner, before becoming an informant on June 5, 1986.

3). When Petitioner was unable to locate a new source of cocaine, Informant Stroud in early July provided Petitioner with a cocaine supplier. Afterwards Stroud attempted to purchase cocaine. Petitioner told Stroud, no, he did not want to become involved, due to having two small children and having been in trouble seven (7) years prior.

4). Informant Stroud in a two month period had made purchases only from two targets, also Stroud's major dealer, he'd been working on, he could no longer find. Officer Lang was unhappy with Stroud's performance, Stroud was then given a quota, he needed at least "one (1) more", and a "good one (1)", to get his desired deal.

5). Mid August, Stroud had not made anymore buys. Officer Lang acted like Stroud wasn't going to get his deal, and he "might have to do some time", because "he was going to have to rap things up pretty soon if (they) wasn't going to

make anymore buys."

6). To secure his freedom, Informant Stroud engineered a drug transaction in late August, by introducing Petitioner to another drug dealer, Stroud told Officer Lang, that Tony (already had made (3) cocaine buys), was getting in a large shipment of marijuana. Stroud engineered a drug transaction, and had Petitioner deliver the marijuana to the first drug supplier (introduce by Stroud), and himself, if not, Petitioner would be cut off from the drug source that Stroud had provided. Only customer Petitioner had was government agents.

7). Officer Lang was the catalyst for Stroud's actions. The first hand knowledge Officer Lang knew of Petitioner, was when Petitioner had paged Stroud, looking to buy some cocaine to use. Officer Lang told Stroud, to "try and make a buy", where no drug dealing activity was going on, Stroud expressed this to Officer Lang. After failed attempts of purchasing cocaine, Lang still continued to send Stroud back, trying to make a purchase. Stroud came to a point, to receive his deal, he felt he had "no choice", but to set Petitioner up.

At trial, these events that happened during the three (3) months, did not exist. Knowing what Stroud had done, to conceal his actions Officer Lang, just prior to the first transaction, told Stroud to "forget" (about the three (3) months) and "(we'd) start here with Wes." (the first (1) transaction).

Stroud gave a deposition in 1995, recanting his testimony, he talked about being at Petitioner's house, he said:

> "When they asked that question when I was on the stand about the pool table, I remember looking at Lang. I didn't know what to say. I mean, I knew I'd been there and Wes was saying I was there.

You know, I felt like they (jury) knew I was lying."

8). Officer Lang erased a taped recording of a transaction. Lang testified at trial that "the recorder was running and running fine, but nothing came out". Officer Mishler and Informant Stroud testified they had heard the recording and described it the same way, coming in and out, in and out. (At trial, court ordered Separation of Witnesses).

On February 2, 1989 Petitioner file an action under 42 U.S.C. § 1983 civil rights suit in the United States Southern District Court of Indiana, Petitioner alleged that he was denied Due Process of law, in that the named defendants knowingly conspired to deprive Petitioner of his liberty, under Fourteenth Amendment.

On October 25, 1995 the District Court granted Officer Lang Summary Judgment, because Smith has not demonstrated a genuine issue of material fact to be resolved at trial and entered Final Judgment.

On February 16, 1996 the Seventh Circuit Court Dismissed for lack of jurisdiction, the district court did not dispose of the claims against all the defendants.

Petitioner requested a Final Judgment and Dismissed other claims against remaining defendants. The District Court granted Request on March 18, 1996.

On June 3, 1996 Petitioner filed his appeal. On May 7, 1997 the Seventh Circuit held:

> "Smith did not attempt to demonstrate that Lang's conduct was so outrageous as to rise to a violation of due process, for instance, by creating the risk of convicting an innocent person" ... "because the defense of entrapment is an "excess for, not a denial of, crime" and thus "does not bear on innocence.""

On May 20, 1997 Petitioner filed for a Rehearing,

inwhich to correct the facts the Seventh Circuit used in making their decision. The Seventh Circuit denied Rehearing on June 16, 1997.

REASON FOR GRANTING PETITION

The Seventh Circuit's decision in this case conflicts with the Supreme Court's ruling in *United States v. Russell*, 411 U.S. 423 (1973), and other circuit's rulings. At the district court level, conflicting decisions are proliferating rapidly in virtually all circuits, and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance, since there are systemic reasons why few of the district court decisions receive appellate review. Moreover the principle of the Seventh Circuit's decision raises a serious question, as to *Limitations*, in regards to due process under Fifth and Fourteenth Amendment.

I). The Court of Appeals' Interpretations of Due Process, Conflicts with the Supreme Court Interpretations and other Authority in the District Courts.

In *United States v. Russell*, 411 U.S. 423, 431-32 (1973):

> [T]he Supreme Court identified due Process as a possible theory available to a defendant to redress governmental entrapment. *Id.* The Court limited relief, however, to instances where law enforcement conduct violates "fundamental fairness, shocking to the universal sense of justice." *Id.*

The Seventh Circuit in it's ruling went beyond *Russell*, and defines due process as:

> "A cause of action exists only where the state law violation is extreme that it raises to the level of a due process violation, such as whether state law violation "create(s) serious risk of convicting an innocent person." *Eaglin v. Welborn*, 57 F.3d 496, 501 (7th Cir.) (en banc), cert. denied. In *Eaglin*, this Court explained that violations of state entrapment laws do not necessary create such a risk because the defense of entrapment is an "excuse for, not a denial of crime" and thus "does not bear on innocence."" *Id.*

The Court overlooks law enforcement conduct that violates "fundamental fairness", mandated in *Russell*, or the question of "limitations". With the Court's ruling, two questions emerge?

A). Does due process violations bear on innocence of the defendant?

The Eighth Circuit in *United States v. Lard*, 734 F.2d 1290, 1296 (1984), held:

> "Apart from entrapment defense, undercover agent's overinvolvment in conceiving and contriving crimes for which defendant was charged approached being so outrageous that due process principles should bar government from invoking judicial processes to obtain a conviction. U.S.C.A. Const. Amend. 5." *Id.*

Here *Lard* was guilty of the offense, but the Court found Lard's due process violated by the actions of law

enforcement.

The Third Circuit in *United States v. Twigg*, 588 F.2d 373, 381 (1978), held:

> "This egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him ... Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred." *Id.*

Here like in *Lard, Twigg* was guilty of the offense, but the Court found *Twigg's* due process violated by the actions of law enforcement.

B). Does due process demand limitations to law enforcement conduct?

In *Rochin v. California*, 342 U.S. 165, 166-67 (1951) *Rochin's* stomach was pumped which produced two (2) morphine capsules, he was charged under "California's Health and Safety Code, 1947, 11,500." Id. The Supreme Court held:

> "The conviction reversed, because it was obtained by methods violative of the Due Process Clause of the 14th Amd." *Id.*, .. "[A] conviction which rest upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rest upon a verbal confession extracted from him by such abuse." *Id.*

Rochin was guilty of the offense, but the Court set *limitations* as to law enforcement actions.

The Ninth Circuit in *United States v. Bogart*, 783 F.2d 1428, 1436 expanded on the Court's view in *Rochin*:

> "We have not accepted the view that this highly discrete group of extreme cases of police brutality defines the limits of unconstitutionally outrageous governmental conduct. We have held that law enforcement conduct also becomes constitutionally unacceptable "where government agents engineer and direct the criminal enterprise from start to finish," *Ramirez*, 710 F.2d at 539; *So*, 755 F.2d at 1353, or when governmental conduct constitutes "in effect, the generation by police of new crimes merely for the sake of pressing criminal charges against the defendant." *Ramirez*, 710 F.2d at 540." *Id.*

II). Whether Petitioner's Fourteenth Amend. right were violated by: 1). The manufacture and creating of *new crime* that was not existing, nor anticipated. 2). Concealing exculpatory evidence, concealing predisposition. 3). Intentionally misleading or with-holding facts which *negate* probable cause to whom that have the ultimate authority to authorize arrest.

In the Seventh Circuit's decision, the account of the conduct of law enforcement was not correct, Petitioner file for a Rehearing, inwhich to correct the Court's account. Petitioner outlined Lang's conduct. see 7th Cir. "Brief", Issue III, "Reply Brief", Issue I, Stroud's "Affidavit", and "Docking Statement", Letters F,G,I,J,K,l. The Court has overlooked such conduct as:

1). Officer Lang gave Informant Stroud a quota when he couldn't produce.

2). Stroud was under duress by Lang to perform, or face prison.

3). Stroud engineered a deal when Petitioner wouldn't deal.

4). Stroud created crime where no crime exist to secure his own freedom.

5). Stroud needed a quantity of drugs, which Petitioner did not have access to.

6). Lang told Stroud to "forget" exculpatory facts, concealing Petitioner's predisposition.

7). Stroud committed perjury to make his testimony more incriminating.

8). Lang destroy evidence to conceal Stroud's actions and Petitioner's predisposition.

9). Lang intentionally mislead those who have the ultimate authority to arrest, inwhich the probable-cause was fabricated and tainted by Stroud's actions that violate due process.

The Seventh Circuit has made this conduct permissible, due to the fact Petitioner was entrapped, Petitioner is no longer an innocent person in the court's eyes, regardless of government conduct. By the Seventh Circuit's ruling, the government can knowingly entrap a person, which it will now have free rain, where by the ends justify the means.

The Court's decision also conflict with 42 U.S.C. § 1983, because there is no recourse or limits against police misconduct when entrapment is used, though the purpose of § 1983 is to:

> Deter state actors from using badge of their authority to deprive individuals of their federally

> guaranteed rights and to provide relief to victims if such deterrence fails. *Wyatt v. Cole*, U.S. Miss. 1992, 112 S.Ct. 1827, 118 L.Ed.2d 504, on remand 994 F.2d 1113.

In *Hunter v. State*, 531 SO.2d 239, 243 (Fla. App. 4 Dist. 1988), held:

> "We believe the action of law enforcement officials here, where the informant was authorized to create new criminal activity in order to secure his freedom, rather then merely assist in apprehending those who had already participated in a crime, crossed the line drawn by *Glosson* wherein the informant was paid "to manufacture, rather then detect, crime."" *Id.*

The Court in *Jacobson v. United States*, 503 U.S. 540, 548 held: "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act ..."

The conduct of law enforcement becomes unconstitutional when the criminal plan originates with the government, and engineer the commission, of new crime, where non existed, merely for the sake of pressing charges. see such cases as: *Sorrells v. U.S.*, 287 U.S. 435 (1932), *Sherman v. U.S.*, 356 U.S. 369 (1958), *U.S. v. Twigg*, 588 F.2d 373 (1978), *People v. Isaacson*, 378 NE.2d 78 (1978), *U.S. v. Lard*, 734 F.2d 1290 (1984).

The Seventh Circuit in *Olson v. Tyler*, 825 F.2d 1116, 1121 (1987), held:

> "A police officer ... in seeking a warrant based

> on truthful and **complete** informant is shielded from liability. But this standard does not neatly fit a situation where a police officer knowingly omit from a warrant application facts that tend to **negate** probable cause. Here the judicial officer making the probable cause determination was deprived of facts that might be important." *Id.*

The Seventh Circuit in *Whitley v. Seibel*, 613 F.2d 682, 686 (1980), held:

> "The fourteenth Amd. does not protect against all deprivations of liberty, but only those accomplished without due process of law. If the officer undertakes to make decisions which are not his to make and then **intentionally** misleads those who have the ultimate authority to authorize the arrest, that officer may be found to have deprived the arrestee of his liberty without due process of law. Although some ... omission may have been only negligent, there is a strong suggestion of intentional and concealed corner-cutting to accomplish the arrest." *Id.*

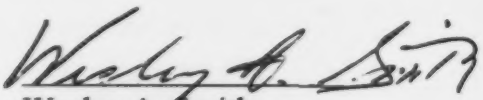
Officer Lang's probable cause was fabricated and tainted by Stroud's action, that violated Petitioner of his due process. Officer Lang *knowingly* concealed Stroud's actions, and intentionally mislead the probable cause court, denying the court of making a valid determination.

In *Williamson v. United States*, 311 F.2d 441,445, held: "*McNabb*, supra, and its progeny clearly forbid the government to make use of the fruits of wrong doing by its officers or agents." *Id.* "Supervisory powers could deny

officer fruits of their misconduct." *United States v. Quinn*, 543 F.2d 648 (1976).

To allow the Order of the Seventh Circuit Court of Appeals to remain, would in effect support such conduct and insulate it from review. In addition, it would be contradictory not only to decisions of other circuits, but to the trend of this Court to insure "Fundamental Fairness" principles, under due process. For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted



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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 96-1951

Wesley Smith,

Plaintiff-Appellant,

v.

Rick J. Lang,

Defendant-Appellee.

ORDER

June 16, 1997.

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before FLAUM, MANION, EVANS, Circuit Judges.

On consideration of the petition for rehearing filed in the above-entitled case on May 21, 1997, by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing, Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 96-1951

Wesley Smith,

Plaintiff-Appellant,

v.

Rick J. Lang,

Defendant-Appellee

ORDER

May 7, 1997.

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before FLAUM, MANION, EVANS, Circuit Judges.

A jury acquitted Wesley Smith of drug-dealing charges pending against him in Hendricks County, Indiana. At trial, Smith's sole defense was that he was entrapped. [FN1]. He brought this action under 42 U.S.C. § 1983 against police officer Rick Lang for entrapping him and arresting him without probable cause. The district court granted Lang's motion for summary judgment. We review the district court's summary judgment *de novo*. *Booker v.*

Ward, 94 F.3d 1052, 1057 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 952 (1997); *Jones v. Webb*, 45 F. 3d 178, 181 (7th Cir. 1995). Because Smith has not demonstrated a genuine issue of material fact to be resolved at trial, and because Lang is entitled to a judgment as a matter of law, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), we affirm.

Mark Stroud became a confidential informant for the Indiana State Police to avoid prosecution for selling cocaine. Officer Lang pressured him to make controlled purchases from suspected drug dealers after Stroud failed to provide any useful information. Stroud told Lang that Smith had previously purchased drugs from him for personal use but not for distribution. Subsequently – apparently after Lang prodded Stroud for more results – Stroud suggested that he might be able to purchase drugs from Smith. Stroud twice wore a wire while going to Smith's home to attempt a purchase, but on neither occasion did Smith have any drugs to sell to Stroud. While monitoring one of these visits, however, Lang learned that Smith (or his wife) planned to contact Stroud as soon as they obtained drugs for resale. Meanwhile, upon further encouragement from Lang, Stroud asked Smith (and he agreed) to be a middle-man in several drug transactions in Hendricks and Morgan Counties. Lang subsequently swore a probable cause affidavit for Smith arrest for drug dealing based on the Hendricks County transactions.

Following his acquittal on the Hendricks County charges. [FN2]. Smith filed suit against Lang under § 1983, alleging that Lang deprived him of his due process by coercing Stroud to lure him into criminal activity, to destroy evidence of the inducement, and to testify falsely at Smith's trial. Smith further alleged that Lang deprived him of his Fourth Amendment rights by not disclosing at Smith

probable Cause hearing that Stroud had been unsuccessful in two attempts to "set up" Smith, and that Stroud had told Lang that Smith was not a seller. (R. at 521, 562.) [FN3].

To survive summary judgment, Smith must demonstrate a material issue of fact (or that Lang is not entitled to judgment as a matter of law) on the issue of whether Lang deprived him of his constitutional rights. *See Celotex*, 477 U.S. at 322-23. With respect to Smith's due process claim, the district court found Lang entitled to summary judgment noting that "a complaint of entrapment does not state a cause of action under § 1983." (R. at 562,564.) We review this decision *de novo* and conclude that Lang is entitled to summary judgment.

In *United States v. Russell*, 411 U.S. 423, 431-32 (1973), the Supreme Court identified due process as a possible theory available to a defendant to redress governmental entrapment. *Id.* The Court limited relief, however, to instances where law enforcement conduct violates "fundamental fairness, shocking to the universal sense of justice." Id. Notably, this circuit has interpreted *Russell* as presenting "an extremely narrow opportunity to challenge government conduct." *United States v. Davis*, 15 F.3d 1393, 1415 (7th Cir.), *cert. denied*, 513 U.S. 896 (1994). Because S 1983 does not provide for relief for ordinary violations of state law, a cause of action exists only where the state law violation is so extreme that it rises to the level of a due process violation, such as when the state law violation "create[s] a serious risk of convicting an innocent person." *See Eaglin v. Welborn*, 57 F.3d 496, 501 (7th Cir.) (en banc), *cert. denied*, -- U.S. --, 116 S. Ct. 421 (1995) (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). In *Eaglin*, this court explained that violations of state entrapment laws do not necessarily create such a risk

because the defense of entrapment is an "excuse for, not a denial of, crime" and thus "does not bear on innocence." *Id.*

In the present case, Smith argues that Lang violated his due process rights by coercing Stroud to entrap Smith, to destroy evidence proving the entrapment, and to testify falsely against Smith. In support of his motion for summary judgment, Lang submitted an affidavit stating that 1) Stroud informed him that Smith was a known drug dealer and that Stroud might be able to purchase drugs from Smith, 2) that Lang learned (by wiring Stroud) that Smith (or his wife) planned to contact Stroud "when they had drugs available for sale," and 3) that Lang arranged the controlled buys only after Smith "contacted [Stroud]" and revealed that he "now had marijuana to sell." (R at 530.) In addition, Lang averred that he did not tell Stroud to testify falsely against Smith, and that he first learned -- after the completion of Smith's Hendricks County criminal trial -- that Stroud may have misrepresented certain facts regarding Smith's involvement in the drug trade. *Id.* Smith did not counter Lang's affidavit. [FN4]. In support of his due process claim, Smith pointed only to the success of his entrapment defense at the Hendricks County trial. He did not attempt to demonstrate that Lang's conduct was so outrageous as to rise to a violation of due process, for instance, by creating the risk of convicting an innocent person. *See Eaglin*, 57 F.3d at 501. Hence, Lang is entitled to judgment as a matter of law on Smith's § 1983 claim based on an alleged violation of due process. *See Himba v. Odegaard*, 769 F2d 1147, 1167 (7th Cir. 1985) (noting that deputy sheriffs' potential for violating defendant's constitutional rights by framing him for crimes they committed arose solely under state law, not under § 1983); *Jones v. Bombeck*, 375 F.2d 737, 738 (3d Cir. 1967) (per curiam) (stating that "[w]hile entrapment may be a

proper defense in a criminal action, a police officer's participation in such activity does not constitute a constitutional violation").

Smith also alleges that Lang violated the Fourth Amendment by applying for an arrest warrant without revealing that his probable cause affidavit was tainted by his own entrapment of Smith. [FN5]. Although Smith's § 1983 claim is properly rooted in the Fourth Amendment, *see Albright v. Oliver*, 510 U.S. 266, 271 (1994) (holding that plaintiff's § 1983 claim implicated Fourth Amendment where plaintiff, who was never convicted or incarcerated, alleged officer deprived him of liberty by arresting him without probable cause) (plurality opinion), it is completely barred by the existence of probable cause. *See Booker*, 94 F.3d at 1057; *Jones*, 45 F.3d at 181; *Simmons v. Pryor*, 26 F.3d 650, 654 (7th Cir. 1993) (stating that probable cause is an absolute bar to defendant's S 1983 liability for unlawful arrest, false imprisonment, or malicious prosecution), *cert. denied*, 511 U.S. 1082 (1994). Probable cause to arrest is not necessarily negated by a defendant's successful assertion at trial of an entrapment defense. *See Simmons*, 26 F.3d at 654. The Fourth Amendment requires that a police officer making an arrest (or relying on an arrest warrant) have knowledge of reasonably trustworthy facts and circumstances sufficient to persuade a prudent person that the suspect committed or was committing an offense. *See Malley v. Briggs*, 475 U.S. 335, 345 (1986) (holding that an arrest warrant will not shield a police officer from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant"); *Booker*, 94 F.3d at 1057; *Jones*, 45 F.3d at 181. Although probable cause is normally a jury question, it can be found as a matter of law

"when no reasonable jury could find that the officer[] did not have probable cause." *Jones*, 45 F.3d at 182.

Smith does not dispute that the evidence presented by Lang at the probable cause hearing (based on information obtained through Stroud) sufficiently demonstrated his involvement in the drug trade. Rather Smith contends that Lang acted unreasonably in relying on the arrest warrant that was secured on the basis of his probable cause affidavit because Lang's Affidavit failed to mention Stroud's statement that Smith was not a seller or the two failed attempts to "set up" Smith. Lang submits that he was reasonable in applying for and relying on the arrest warrant because the omissions were immaterial. Moreover, as previously noted, Lang averred that he applied for and relied on the arrest warrant only after being apprised of Smith's drug-dealer reputation and of Smith's agreement to be the middle-man in a "deal" arranged by Stroud. (R. at 539, Lang Aff.). Smith's submissions in response to Lang's Affidavit, *see supra* n. 4, do not demonstrate the existence of a material issue concerning Lang's reasonableness in applying for and relying on the arrest warrant. Stroud's affidavit merely confirms his role as a confidential informant and further describes the context of the transactions leading to Smith's arrest. And even if Stroud affidavit confirms that Lang pressured him for results, it does not counter Lang's affidavit that Stroud arranged the controlled purchases only *after* Smith revealed his interest in obtaining drugs for resale. Thus, we we do not see he Stroud's earlier remarks that Smith was not a dealer and that Smith refused to deal on other occasions undermined Lang's reasonableness in applying for and relying on the arrest warrant on this occasion. Indeed, no reasonable jury could find that Lang did not have probable cause. [FN6].

We further reject Smith's attempt to demonstrate a material issue by pointing to this court's opinion in *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (noting that neither a prosecutor's decision to charge, a grand jury's decision to indict, nor a prosecutor's decision not to drop charges will shield police officer from civil liability "who deliberately supplied misleading information that influenced the decision"). *See also Albright*, 510 U.S. at 279 (stating that the Fourth Amendment may be violated in a case in which an officer gives misleading testimony at a preliminary hearing and that testimony "served to maintain and reinforce the unlawful haling in of [the defendant] into court") (Ginsburg, J., concurring). Although *Jones* upheld § 1983 liability where police officers violated the Fourth Amendment by deliberately supplying incomplete and misleading information to the prosecution, *Jones*, 856 F.2d at 994, the facts there are – as noted by the district court – very dissimilar to those presented here. Unlike in *Jones*, the evidence Lang "withheld" was neither exculpatory, nor the type of information that would certainly have convinced the prosecution to drop the charges against Smith. [FN7]. As previously noted, Stroud's comments that "Smith was not a seller" and had refused to sell on a few prior occasions do not clearly undermine the evidence also provided to Lang demonstrating Smith's willingness to sell. Hence, because Lang was reasonable in applying for and relying on an arrest warrant for Smith based on the information he provided in his probable cause affidavit, Smith's Fourth Amendment claims are necessarily barred. Accordingly, we AFFIRM the judgment of the district court granting Lang's motion for summary judgment against Smith's § 1983 claims.

[FN*] After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

[FN1] Smith submitted a juror's affidavit stating the the jury believed Smith was entrapped. (R. at 538, Reynolds Aff.)

[FN2] Smith was subsequently tried in Morgan County for his drug sales there. Although his original conviction in Morgan County was reversed on appeal, *Smith v. State of Indiana*, 565 N.E. 2d 1059 (1991), he was convicted upon retrial, and that conviction was affirmed on appeal, *Smith v. State of Indiana*, No. 55A01-9601-Cr-2 (Ind S. Ct. Aug. 20, 1996). The district court found that this Morgan County conviction does not bar Smith's suit, *see Heck v. Humphrey*, 512 U.S. 477 (1994), because Smith's § 1983 claims relate only to Lang's conduct in procuring Smith's Hendricks County arrest. (R at 507). Even if we consider the arrest to be so intertwining that *Heck* does apply, his Morgan County conviction does not bar Smith's Fourth Amendment claims because an illegal arrest does not undermine the legality of the conviction. *See Heck*, 512 U.S. at 487 n. 7; *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 104 (1996).

[FN3] In his Response to the District Court's Order to Clarify his Contentions, Smith alleged that Officer Lang deprived him of his Fourth Amendment right to be arrested upon a warrant based on probable cause, and of his Fifth and Fourteenth Amendment rights not to be deprived of liberty without due process of law. (R. at 521.) Because Lang acted under color of state rather then federal law, Smith's due

process claim implicate the Fourteenth rather than the Fifth Amendment. *See Bivens v. Six Unknown Named Federal Bureau of Narcotics Agents*, 403 U.S. 388, 392 (1971). Moreover, although Smith also pleaded a Sixth Amendment Claim, he waived this argument by not raising it on appeal. *See Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 557 (7th Cir. 1996).

[FN4] In opposition to Lang's motion, Smith submitted several documents, including: (1) copies of the jury verdict forms acquitting him in the Hendricks County trial; (2) a newspaper article noting his acquittal based on entrapment; (3) a juror's affidavit; (4) *uncertified* copies of Stroud's deposition testimony stating that he believed Lang set up Smith and that Lang told him not to testify regarding the failed attempts to purchase drugs from Smith; and (5) *uncertified* copies of excerpts from testimony from his Hendricks County and Morgan County criminal trials. (R. at 538.) The first three items do not contradict Lang's affidavit, and the latter two uncertified submissions may not be used to support Smith's argument. *See* Fed. R. Civ. P. 56(e) (providing that affidavits shall set forth facts as would be admissible in evidence; supporting papers shall be sworn or certified). Smith also submitted Stroud's affidavit confirming that he wore a wire to Smith house to allow Lang to obtain incriminating evidence regarding Smith's drug activity, and that he "set up" drug transactions with Smith.

[FN5] According to the district court, "Smith assert[ed] that Lang's probable cause affidavit, which resulted in his arrest, was incomplete, thus depriving the court of the opportunity to make an informed decision of probable cause." (R. at 562, 564.)

[FN6] Because Lang did not learn of Stroud's alleged perjury until after Smith's Hendricks County trial, his reasonableness in applying for and relying on the arrest warrant remains intact. *Maltby v. Winston*, 36 F3d 548, 557 (7th Cir. 1994) (noting that evidence discovered after arrest is not relevant to inquiry into probable cause for arrest), *cert. denied*, 115 S. Ct. 2576 (1995).

[FN7] In *Jones*, the police officer failed to inform the prosecution about information contained in "street files" that could have exculpated the defendant. *Id.* at 988-89. In addition, the police submitted a report to the grand jury that contained numerous falsehoods and excluded any mention of the exculpatory evidence. *Id.* at 990. Moreover, the police department failed to alert prosecutors when one of the officers involved in the murder investigation wrote a report that indicated that they arrested the wrong person. *Id.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civ. No. IP 89-0174-C M/S.

Wesley Smith,

Plaintiff-Appellant,

v.

Rick J. Lang,

Defendant-Appellee

ORDER

October 25, 1995.

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before McKinney, District Judge.

Plaintiff Wesley Smith ("Smith") complains that he was arrested and tried for certain drug offenses resulting from the coercion of an informant by defendant police officer Rick Lang ("Lang"). In addition, Smith asserts that Lang's probable cause affidavit, which resulted in his arrest, was incomplete, thus depriving the court of the opportunity to make an informed decision of probable cause. Smith

further contends that Lang's alleged conduct violated his Fourth and Sixth Amendment rights. He seeks redress under 42 U.S.C. § 1983.

Lang has moved for summary judgment on Smith's claim. Taking the facts as tendered by Smith, informant Mark Stroud ("Stroud") was arrested in June of 1986. Lang told Stroud that if Stroud could do some undercover work and "set up" some buys, Lang would help him with his case. According to Stroud, Lang was not satisfied with his efforts for the first two months. The two had spoken about some possible sellers by name. Stroud states that Lang turned up the heat on him to make some purchases and specifically mentioned Smith by name.

Stroud told Lang that Smith did not sell, that Smith just bought for his own personal use. He also told Lang that his attempts to buy from Smith had been unsuccessful. Nevertheless, Lang insisted on results from Stroud. Stroud, in response to Lang's prodding, arranged for Smith to be the middle man for two different transactions, one marijuana and one for cocaine. But for the suggestions of Stroud, Smith would not have been involved at all in the sale of either of these drugs.

Smith further complains that after Lang coerced Stroud to entrap him by luring him into committing criminals acts, Lang deliberately withheld facts from the court at the probable cause hearing. Specifically, Smith complains that Lang left out the facts regarding Stroud's unsuccessful attempts to "set up" Smith and Stroud's statement to Lang that Smith did not and would not sell.

Even accepting Stroud's affidavit as accurately portraying the relevant events, the Court now finds the defendant's motion for summary judgment to be well taken. By with holding information about informant Stroud's

unsuccessful attempts at purchasing drugs from Smith, and the conclusion that Smith was not a seller, Lang did not deprive Smith of any of his constitutional rights.

Smith does not deny his role in the sale of the drugs. He successfully availed himself of the defense of entrapment at trial. The Court that determined probable cause did so on the basis of the testimony of Lang that Smith probable sold drugs. Smith admits that he did play a role in the sale. A criminal defendant has no constitutional right of which this Court is aware to have his defenses adjudicated at the probable cause hearing.

In addition, a complaint of entrapment does not state a cause of action under § 1983. Jones v. Bombeck, 375 F2d 737 (3rd Cir. 1967) held, "[w]hile entrapment may be a proper defense in a criminal action, a police officer's participation in such activity does not constitute a constitutional violation." Shieb v. Humane Society of Huron Valley, 582 F. Supp. 717, 725 (E.D. Mich. 1984), agreed. Plaintiff cannot make a § 1983 claim out of the entrapment.

Smith refers the Court to Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) in support of his position. The police conduct described in that case involved arresting and assisting with the prosecution of a defendant who had not committed the crime. In addition, the defense made concessions that made it unnecessary for the Court to "examine the difficult question whether malicious prosecution can ever count as a deprivation of liberty without due process of law when the defendant is not imprisoned ..." Jones, 856 F.2d at 992. In short, Jones is inapposite.

Defendant's motion for summary judgment is Granted. The police officer did not commit a constitutional violation by failing to put forth what turned out to be a successful entrapment defense before the judge at the

probable cause hearing. The pressure the C.I. testified he felt from Lang to make a drug bust does not translate to outrageous conduct on the part of law enforcement. Nor does it change the fact that a claim of entrapment does not state a cause of action under § 1983. Judgment is therefore entered in favor of the defendant Rick J. Lang and against the plaintiff Wesley Smith.

IT IS SO ORDERED this 25th day of October, 1995.

BY THE COURT

/S/

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana